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# The way forward

The year ending in June 2009 was a year packed with action and excitement. Politically, it was a year of elections. Some of the political activities played themselves out at or near the courts. Mr Zuma was indicted

by the NPA to face charges of corruption. His party contended that his indictment was part of a political plot to prevent him from becoming President of the country. Mr Zuma took the NPA to court to challenge the lawfulness of the raids on his house and those of his lawyers. This case was before the Constitutional Court when the judges of that court lodged a complaint with the JSC against the Cape Judge President, accusing him of having improperly attempted to influence the decision of the Constitutional Court.

That complaint by the Constitutional Court judges led to a counter-complaint to the JSC by the Cape Judge President against the Constitutional Court judges. It also led to litigation in court between the Cape Judge President and the Constitutional Court judges. The first case was heard before a five judge Bench of the South Gauteng Division of the High Court. The court ruled in favour of Judge Hlophe. Its decision was appealed against to the Supreme Court of Appeal, heard by nine judges. The SCA upheld the appeal holding that: '[T]he fact that the respondent is a judge does not give him special rights or special protection. Judges are ordinary citizens. What applies to others applies to them .... They, too, like government, pressure groups, or other individuals, "may not interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision" ...'

An appeal against the decision of the Supreme Court of Appeal is presently pending before the Constitutional Court.

In *Minister of Interior and Another v Harris and Others* 1952 (4) SA 769 (A) Schreiner JA said that:

'[o]ur Courts are manned by fulltime judges trained in the law, who are outside party politics and have no personal interest in the cases which come before them...' In the same matter, Greenberg JA stated, '[t]he high standard of impartiality necessary for judicial determination of questions both of fact and of law is a cornerstone of that system and is preserved by the undoubted principle that no one should be a judge in his own cause...'

If the matter of the *Judge President of the Cape v The Judges of the Constitutional Court* continues before the Constitutional Court, the principle enunciated above will be tested.

In an application brought by Mr Zuma before the Natal Provincial Division, Nicholson J dismissed the criminal indictment against Mr Zuma, declaring invalid the decision taken by the National Prosecuting Authority during or about 28 December 2007 to prosecute the applicant, and setting the decision aside. The learned judge held:

'The timing of the indictment by Mr Mpshe on 28 December 2007, after the President suffered a political defeat at Polokwane was most unfortunate. This factor, together with the suspension of Mr Pikoli, who was supposed to be independent and immune from executive interference, persuade me that the most plausible inference is that the baleful political influence was continuing. If the NDPP is to be totally independent and perform his functions without fear and favour he should not be liable to suspension by the executive at any given moment.'

Politically the dismissal of the charges led to a lot of excitement, especially amongst members of the ANC and followers and supporters of Mr Zuma. It is probably fair to say that it led to, or precipitated, the recall of the former president, Thabo Mbeki. Later in the year, the SCA, overturned the judgment of Nicholson J. Harms ADP found that Nicholson J had failed to confine himself to issues before the

court, decided matters that were not germane or relevant, created new factual issues, made gratuitous findings against persons who were not called upon to defend themselves, failed to distinguish between allegations, fact and suspicion, and transgressed the proper boundaries between judicial, executive and legislative functions. Some of the statements were rather harsh and could easily be interpreted as suggesting that Nicholson J had been motivated by a political or other agenda. They could easily have led to a loss of public confidence in him as a judge. In fact, some members of the public ask whether Nicholson J had not overstepped or transgressed the boundaries within which he should have acted, whether he should not step down, and whether his mistakes did not amount to gross misconduct.

The last year was not easy for the judiciary. The judiciary was heavily criticised by political parties, and was accused of being biased and of being an instrument of counter-revolution. As if that were not enough, judges were lambasting each other in the public domain. The public spat between the judges of the Constitutional Court and the Cape Judge President has left a stain on our judiciary. Unfortunately, all these matters attracted public attention because of the public's interest in the outcome of Mr Zuma's cases. Precisely for this reason, an impression has been left and a perception exists that the political battles that divided society also affected and divided the judiciary.

The result of all of this is that we are left with a bruised, bleeding and battered judiciary. It is too easy to find culprits and wrongdoers. That I will not do. What I will however do is to remind everyone that in moments of public excitement it is not uncommon for people to single out and blame the judiciary for the ills of society. In the early 1920s, when the white working class was militant and fighting for its rights and interests, at a time when some workers were dragged before the courts by the government for their role in the 1922 miners' strikes, and when some workers were sentenced to death for the terrible consequences that followed that strike, the judiciary was accused of being 'a bogus aristocracy partly of coloured blood... who have in most cases both a political bias and a social prejudice against the white worker.'

During the apartheid era, judges were accused of being executive-minded and of doing no more than rubberstamp executive action. In every period, the judiciary has to resolve disputes that come before it. Disputes in society will inevitably reflect the contradictions within society. The judiciary will always be in the thick of things and must expect to be criticised, sometimes positively and sometime negatively, depending on the state of society.

However, it will be folly not to recognise that there have been events in the last year which affected the judiciary and which were unfortunate. We must all acknowledge that it is not desirable to have judges having to deal with matters involving not one, but all the judges of the highest court. While we cannot turn the clock back, we should be bold enough to say that going forward, the judiciary needs to come out of the space it is occupying.

We can only hope that those who have a role to play in appointing the leadership and leaders of the judiciary will take this into account when anointing the Chief Justice. The judiciary needs a leader or leaders who recognise that the judiciary is not an institution given to the people of South Africa by God. The judiciary is a creature of the Constitution. Its source of authority is the Constitution. It was brought into existence by the Constitution, by the people, who

by majority through their representatives voted overwhelmingly for its adoption.

It is the Constitution that recognised and established the three arms of government and other institutions. It is the Constitution that recognised the principle of separation of powers. The Constitution

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empowers each of the arms of government including the courts. The Constitution states the limitations of governmental power. At the heart of the Constitution is the maintenance of a balance between authority and liberty, between governmental power and the individual's rights. Separation of powers, judicial independence and the maintenance of the rule of law are not concepts which have meaning outside the concept of democracy. Courts cannot perform their tasks properly unless they enjoy political legitimacy and are accepted by the majority of the people and perceived by that majority as being part of the political system of democracy brought into being by the people through the Constitution. Courts cannot function in a South African society if they are perceived to be resisting change. The courts and the judiciary, including the legal profession, should rid themselves of the perception that they represent a rejected past. The judiciary should be seen as embracing the change. The judiciary should be seen to embrace the constitutional principles contained in section 9 of the Constitution for redressing past inequalities. The judiciary should rid itself of the perception that it is a Western and not an African judiciary.

The South African judiciary is probably the only one in the world dealing with a situation where socio-economic rights are not simple instructions to government (directives of State policy) and not directly enforceable before the courts. Looked at from this perspective, the SA judiciary has far-reaching policy-making powers derived from the Constitution.

It is therefore arguable that some of the well established concepts of judicial restraint may not apply in exactly the same way as they apply in jurisdictions where the courts' testing powers relate mainly to liberal democratic rights, and the concept of 'Government Hands Off.' The South African judiciary is probably one of very few whose courts recognise customary law, which lives side by side with Western concepts of equality. The South African judiciary must accept its unique powers and must exercise them in a uniquely South African way.

The confidence bestowed on our judiciary by the people should not be taken for granted; it is an honour that demands cherishing by the courts. The challenge for the courts is to define the SA concept of separation of powers and the new balance in the relationship between the three arms of government. The judiciary must be more creative and careful in borrowing from countries where the judiciary may have different powers. That is the challenge for the incoming leader of the judiciary. His challenge is to make our judiciary an Africa judiciary presiding over problems of Africans and solving African problems. 